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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO GUERRERO,

Defendant and Appellant.

D052977

(Super. Ct. No. SCD210270)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

I.

INTRODUCTION

Defendant Mario Guerrero appeals from his judgment of conviction for one count of robbery. Guerrero contends that the trial court erred in instructing the jury with an instruction regarding flight because, he asserts, the instruction "permitted the jury to draw unreasonable inferences from [Guerrero's] simple act of fleeing the vehicle some hour

and one-half after the robbery had occurred." We conclude that the trial court properly instructed the jury with the flight instruction because the evidence was such that the jury was entitled to infer that Guerrero's flight from police officers reflected a consciousness of guilt, and the prosecution relied on evidence of Guerrero's flight to establish guilt. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On November 19, 2007, Sara Botello, Franco Castellanos, Delmi Ramos, and Sergio Valtierra were working the night shift at a Taco Bell in the City Heights area of San Diego.

At approximately 8:45 p.m., Valtierra took a break and walked outside to go to the restaurant's bathroom. Valtierra saw two men who were about to enter the restaurant. He noticed that the men were covering their faces, one with a hood and the other with a hat, and he thought this was suspicious.

Customer Martina Burton was in the restaurant looking at the menu when Guerrero and Pedro Brieno entered the restaurant. Guerrero bumped Burton out of the way as he walked toward the cash register where Botello was standing. Guerrero appeared to be holding a gun under a towel. He demanded money from Botello.

In the meantime, Brieno walked over to Ramos and pushed something hard against her ribs. He told her not to worry because they just wanted the money. At some

point Ramos informed Castellanos that the store was being robbed, and Castellanos pushed an emergency alarm button.

Botello felt Guerrero press something cold against her neck as he removed the drawers from both cash registers. The registers contained about \$283 in cash. Guerrero and Brieno also demanded money from the "big bills" deposit boxes under the counter, but Botello told them there was nothing there.

Guerrero and Brieno walked out of the restaurant. Burton, who had called 911, followed the men outside. At this point, Valtierra was returning from the bathroom. Valtierra and Burton watched Guerrero and Bierno run to an older model, red four-door vehicle with Mexican license plates, which was being driven by a third man.¹ Guerrero got into the front passenger seat, while Bierno got in the back seat, behind the driver. As Guerrero was getting into the car, he looked at Valtierra, pointed at the restaurant, and pulled his finger across his neck twice. Valtierra understood this to mean that Guerrero was warning him to remain quiet about the robbery. The car drove off at a high rate of speed, with its tires screeching.

San Diego Police Officer Oscar Amado and his partner, Officer Gerald Perez, were on routine patrol on the evening of November 19, 2007. They received a "be on the lookout" (BOL) radio bulletin regarding a "smaller sedan, burgundy in color, with three

¹ Although someone had told the police that the car was a Honda, police ultimately found the men in a Toyota that otherwise matched the general description of the car that witnesses had provided.

Hispanic males that had robbed a Taco Bell." The bulletin also informed the officers that the car displayed Mexican license plates.

Approximately an hour to an hour and a half after receiving the BOL bulletin, Amado saw a car with three Hispanic males inside that matched the description of the robbery suspects' car. Amado and Perez began to follow the car in their patrol vehicle and called for assistance. At some point while the officers were following the vehicle, the driver failed to properly stop at a stop sign and instead, "sped off from t[he] stop sign at a high rate of speed." As the officers turned on their vehicle's emergency lights and began to chase the vehicle, the suspects' car veered to the right. Three men jumped out of the car and began running away from the officers. Amado saw Guerrero jump out from the front passenger seat. Amado caught up with the driver, Manuel Contreras, and then began to look for Guerrero. Another officer eventually stopped Guerrero.

Each of the three suspects had money in his possession. Brieno had \$65, Contreras had \$70, and Guerrero had \$141, totaling \$276.

B. *Procedural background*

Guerrero was charged with one count of robbery in violation of section 211. The information also alleged that Guerrero had served a prior prison term within the meaning of section 667.5, subdivision (b).

A jury convicted Guerrero of robbery on April 2, 2008. Guerrero admitted the truth of the prison prior allegation the same day. On May 2, 2008, the trial court sentenced Guerrero to the midterm of three years in state prison for the robbery, plus an additional year for the prison prior enhancement.

Guerrero filed a timely notice of appeal on May 2, 2008.

III.

DISCUSSION

Guerrero contends that the trial court erred in instructing the jury with CALCRIM No. 372, a standard flight instruction.² Guerrero asserts that although "[t]here was some testimony that appellant may have been the individual who jumped in the right front passenger seat, . . . these identifications were less than one hundred percent certain." He maintains that "[t]he giving of the flight instruction in this case permitted the jury to draw unreasonable inferences from the simple act of fleeing the vehicle some hour and one-half after the robbery had occurred," and that "[g]iven the lack of certainty of the witnesses, the giving of the flight instruction improperly influenced the jury." Guerrero argues, in essence, that because his identity as one of the robbers was at issue in the case, it is possible that he fled from officers for reasons other than that he participated in the robbery.

At the time the trial court discussed the proposed jury instructions with the attorneys, defense counsel did not object to the court's decision to give CALCRIM No.

² As read by the trial court, CALCRIM No. 372 provides: "If the defendant fled immediately after the crime was committed or after he was accused of committing a crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

372. Guerrero's claim of error is thus forfeited. (*People v. Bolin* (1998) 18 Cal.4th 297, 326 (*Bolin*).)³

Guerrero's claim also fails on its merits. The trial court must give a flight instruction whenever the prosecution relies on evidence of flight to show a consciousness of guilt. (§ 1127c.) "[A] flight instruction is correctly given 'where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt.'" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight." (*People v. Mason* (1991) 52 Cal.3d 909, 943.)

Here, the evidence was such that the jury could reasonably infer that Guerrero's flight—from the Taco Bell and, later, from police officers—reflected a consciousness of guilt. A number of eyewitnesses identified Guerrero as one of the robbers, both on the night of the robbery and at trial. Valtierra testified that Guerrero was the individual who,

³ In *Bolin*, defense counsel had "agreed the evidence supported" the flight instruction "and did not object to the court's proposed wording." (*Bolin, supra*, 18 Cal.4th at p. 326.) The Supreme Court concluded that in these circumstances, the defendant had "waived" any claim of error. (*Ibid.*) Although defense counsel in this case implicitly agreed with the giving of the flight instruction by failing to register any objection, in our view, this situation presents a circumstance more appropriately falling within the doctrine of forfeiture, not waiver. "[T]he terms 'waiver' and 'forfeiture' have long been used interchangeably. The United States Supreme Court recently observed, however: 'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)

as he was getting into the front passenger seat of the getaway car, looked at Valtierra, pointed at the Taco Bell, and pulled his finger across his neck as a warning to Valtierra.

There was also substantial evidence identifying Guerrero as one of the three suspects who fled the car after officers began pursuing them. Officer Amado testified that Guerrero was the man he saw jump out of the front passenger seat of the car and run from the officers. The evidence thus suggested that Guerrero was one of the men who robbed the Taco Bell and who ran from police officers not long after the robbery. The jury could reasonably infer a consciousness of guilt based on this evidence.

The court's giving of the flight instruction was proper despite the fact that Guerrero fled from police approximately an hour or an hour and a half after the crime was committed. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021 [flight instruction proper despite fact that defendant "had remained at home for two days" after the victim disappeared and only left his home after the victim's body was found]; *People v. Carter* (2005) 36 Cal.4th 1114, 1182 [flight instruction appropriate where defendant "left California in the days immediately following the charged offenses"] (*Carter*); *People v. Jones* (1991) 53 Cal.3d 1115, 1145 [evidence that defendant fled from crime scene and "attempted to leave town unexpectedly within hours after the killings" was sufficient to support giving of flight instruction].) "[T]he [flight] instruction neither requires knowledge on a defendant's part that criminal charges have been filed, nor a defined temporal period within which the flight must be commenced [Citation.]" (*Carter, supra*, 36 Cal.4th at p. 1182.) We conclude that the trial court properly instructed the jury with CALMCRIM No. 372.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.